

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

ROBERT CHARLES LAVERY,)	Case No.: 1:20-cv-00948-JLT (HC)
)	
Petitioner,)	ORDER DIRECTING CLERK OF COURT TO
)	ASSIGN DISTRICT JUDGE
v.)	
)	FINDINGS AND RECOMMENDATION TO
CALIFORNIA DEPARTMENT OF)	DISMISS PETITION
CORRECTIONS AND REHABILITATION,)	
)	[THIRTY-DAY OBJECTION DEADLINE]
Respondent.)	
)	

On July 8, 2020, Petitioner filed the instant petition for writ of habeas corpus. (Doc. 1.) For the following reasons, the Court will recommend it be SUMMARILY DISMISSED without prejudice.

DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. . .” Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). The Advisory Committee Notes to Rule 8 indicate that the Court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after an answer to the petition has been filed.

1 B. Failure to Name a Proper Respondent

2 Petitioner fails to name the proper respondent. A petitioner seeking habeas corpus relief under
 3 28 U.S.C. § 2254 must name the state officer having custody of him as the respondent to the petition.
 4 Rule 2(a) of the Rules Governing § 2254 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir.
 5 1996); Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person
 6 having custody of an incarcerated petitioner is the warden of the prison in which the petitioner is
 7 incarcerated because the warden has “day-to-day control over” the petitioner. Brittingham v. United
 8 States, 982 F.2d 378, 379 (9th Cir. 1992); see also Stanley, 21 F.3d at 360. However, the chief officer
 9 in charge of state penal institutions is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360.
 10 Where a petitioner is on probation or parole, the proper respondent is his probation or parole officer
 11 and the official in charge of the parole or probation agency or state correctional agency. Id.
 12 Petitioner’s failure to name a proper respondent requires dismissal of his habeas petition for lack of
 13 jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326 (9th Cir.
 14 1970); see also Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976).

15 C. Exhaustion

16 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
 17 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
 18 exhaustion doctrine is based on comity to the state court and gives the state court the initial
 19 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S.
 20 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

21 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
 22 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.
 23 Henry, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court was given a full
 24 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the
 25 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504
 26 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

27 Petitioner indicates that he did not file an appeal in the California Court of Appeal and also did
 28 not seek review in the California Supreme Court. (Doc. 1 at 5.) Because it appears Petitioner has not

presented his claims for federal relief to the California Supreme Court, the Court must dismiss the petition. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The Court cannot consider a petition that is unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982). Therefore, the petition must be dismissed for lack of exhaustion.

D. Failure to State a Cognizable Federal Claim

The basic scope of habeas corpus is prescribed by statute. Title 28 U.S.C. § 2254(a) states:
The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.*

(emphasis added). See also Rule 1 to the Rules Governing Section 2254 Cases in the United States District Court. The Supreme Court has held that “the essence of habeas corpus is an attack by a person in custody upon the legality of that custody . . .” Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

To succeed in a petition pursuant to 28 U.S.C. § 2254, the petitioner must demonstrate that the adjudication of his claim in state court

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1),(2). In addition to the above, Rule 2(c) of the Rules Governing Section 2254 Cases requires that the petition:

- (1) Specify all the grounds for relief available to the petitioner;
- (2) State the facts supporting each ground;
- (3) State the relief requested;
- (4) Be printed, typewritten, or legibly handwritten; and
- (5) Be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242.

A petition for writ of habeas corpus must specify the grounds for relief as well as the facts supporting each ground. Rule 2(c) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 2254. The petitioner must make specific factual allegations that would entitle him to habeas corpus relief if they are true. O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); United States v. Popoola, 881 F.2d

1 811, 812 (9th Cir. 1989). Each ground for relief must be clearly stated and allege what federal
 2 constitutional violation has occurred, along with providing facts that support the grounds for relief.

3 The petitioner appears to seek transfer and proper medical care. (See Doc. 1.) Petitioner alleges
 4 that due to COVID-19, he cannot be treated for his medical conditions and cannot be transferred. (Id.
 5 at 3.) He also appears to allege that he has not received proper treatment for hepatitis C, liver disease,
 6 epilepsy and mental health issues. (Id.)

7 On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic
 8 Security Act (the “CARES Act”), P.L. 116-136, 134 Stat 281. The CARES Act provides, in part,
 9 home confinement authority to the Bureau of Prisons during the period beginning on the date on which
 10 the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 et
 11 seq.) with respect to the COVID-19 pandemic, if the Attorney General finds that emergency
 12 conditions will materially affect the functioning of the Bureau. The CARES Act, § 12003(b)(2). In a
 13 memorandum dated March 26, 2020, U.S. Attorney General William Barr directed the federal Bureau
 14 of Prisons (“BOP”) to identify suitable inmates for home confinement with COVID-19 risk factors to
 15 minimize the risk of inmates’ health due to the ongoing COVID-19 pandemic. Off. of the Att’y Gen.,
 16 Mem. for Dir. of Bureau Prisons, *Prioritization of Home Confinement as Appropriate in Response to*
 17 *COVID-19 Pandemic* (March 26, 2020), <https://www.justice.gov/coronavirus>; see also Off. of the
 18 Att’y Gen. Mem., Mem. for Dir. of Bureau Prisons, *Increasing Use of Home Confinement at*
 19 *Institutions Most Affected by COVID-19* (April 3, 2020), <https://www.justice.gov/coronavirus>.
 20 However, this form of relief through the CARES Act is available to *federal* prisoners incarcerated at
 21 Bureau of Prisons facilities, of which petitioner is not.

22 Moreover, federal habeas corpus relief is available only for challenges to the duration or
 23 legality of a prisoner’s confinement. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). Although
 24 petitioner’s request appears to argue the current prison conditions expose him to a higher risk of harm
 25 due to his various medical conditions and COVID-19, petitioner’s request relates to the conditions of
 26 petitioner’s confinement and accordingly is more appropriately brought pursuant to 42 U.S.C. § 1983.
 27 Bowman v. California, No. EDCV 19-00184 RGK (RAO), 2019 WL 4740538, at *1-2 (C.D. Cal. June
 28 26, 2019) (Petitioner’s request for release from custody based on jail conditions through a habeas

petition was dismissed for failure to state a cognizable federal claim. Claims relating to conditions of confinement for state prisoners are more appropriately brought under 42 U.S.C. § 1983 even though petitioner also requested release from custody as a form of relief).¹

E. Younger Abstention

Under principles of comity and federalism, a federal court should not interfere with ongoing state criminal proceedings by granting injunctive or declaratory relief except under special circumstances. Younger v. Harris, 401 U.S. 37, 43-54 (1971). Younger abstention is required when: (1) state proceedings, judicial in nature, are pending; (2) the state proceedings involve important state interests; and (3) the state proceedings afford adequate opportunity to raise the constitutional issue. Middlesex County Ethics Comm. v. Garden State Bar Ass’n, 457 U.S. 423, 432 (1982); Dubinka v. Judges of the Superior Court, 23 F.3d 218, 223 (9th Cir. 1994). The rationale of Younger applies throughout the appellate proceedings, requiring that state appellate review of a state court judgment be exhausted before federal court intervention is permitted. Dubinka, 23 F.3d at 223 (even if criminal trials were completed at time of abstention decision, state court proceedings still considered pending).

The law of habeas corpus also provides guidance on when a district court should abstain from review of a claim. In order to be granted federal habeas corpus relief, the petitioner must have exhausted his available state remedies. 28 U.S.C. § 2254(b). The rule of exhaustion is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991). The exhaustion requirement can be satisfied by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971)

It is unclear from the petition whether petitioner has been convicted. He indicates a sentencing date in the future, July 16, 2020, indicates that his release date “has not been determined,” and also states that “a plea deal seems like my only option.” (Doc. 1 at 2-3.) Additionally, Petitioner may have

¹ The pendency of civil rights actions (now) involving COVID-19, such as the Coleman v. Newsome, 2:90-cv-0520 KJM DB (E.D. Cal.)/Plata v. Newsome, 01-cv-01351 JST (N.D. Cal.) class action, is the appropriate forum to address conditions of confinement.

1 filed this petition in the wrong court, as he has captioned it for Kings County Superior Court. (*Id.* at
2 1.) California has an important interest in passing upon and correcting violations of a defendant's
3 rights. *Roberts v. Dicarlo*, 296 F.Supp.2d 1182, 1185 (C.D. Cal. 2002) (citing *Koerner v. Grigas*, 328
4 F.3d 1039, 1046 (9th Cir. 2003)). The state courts are adequate forums for Petitioner to seek relief for
5 his claims and it appears he has not availed himself of those avenues for relief. *Roberts*, 296
6 F.Supp.2d at 1185. Therefore, the Court recommends abstaining from interfering in state proceedings
7 pursuant to *Younger*. The petition should be dismissed without prejudice.

8 **ORDER**

9 The Court DIRECTS the Clerk of Court to assign a district judge to the case.

10 **RECOMMENDATION**

11 Accordingly, the Court RECOMMENDS that the habeas corpus petition be SUMMARILY
12 DISMISSED without prejudice.

13 This Findings and Recommendation is submitted to the United States District Court Judge
14 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
15 Local Rules of Practice for the United States District Court, Eastern District of California. Within
16 thirty days after being served with a copy, Petitioner may file written objections with the Court. Such
17 a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation."
18 The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C).
19 Failure to file objections within the specified time may waive the right to appeal the District Court's
20 order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

21
22 IT IS SO ORDERED.

23 Dated: July 9, 2020

/s/ Jennifer L. Thurston
24 UNITED STATES MAGISTRATE JUDGE
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